SUPREME COURT, U. S.

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No. 73-673

In the Supreme Court of the United States

OCTOBER TERM, 1973

LEO WINTERS, PETITIONER

v.

LUTHER BOHANON, JUDGE, UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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The principal issue presented by this petition is whether a district court judge can vacate an oral order transferring venue, before there has been any action by the parties thereon, in order to hear argument and reconsider the necessity for such change of venue.

Petitioner and others are defendants in two cases pending in the United States District Court for the Western District of Oklahoma. In one of those cases, petitioner and three co-defendants are accused of conspiring to violate 18 U.S.C. 1341 (mail fraud) and 18 U.S.C. 1951 (Hobbs Anti-Racketeering Act). In the other case, petitioner and eleven co-defendants are accused of conspiring to violate 18 U.S.C. 656 (misapplication of bank funds).

On Friday, June 8, 1973, petitioner and fourteen co-defendants were arraigned on the two cases. At that time counsel for petitioner orally moved for a change of venue due to pretrial publicity (Arraignment transcript 19-22).[1] The United States Attorney requested five days' time to respond to petitioner's motion and pointed out that the local rules of procedure required such a motion to be in writing and supported by a brief. Judge Bohanon "waived" the requirement for filing a brief and immediately granted the motion.[2] He indicated that he was transferring both cases and *all* defendants to the Eastern District of Oklahoma, that he would file an order to that effect the following week, and that any and all motions should be filed in the Eastern District of Oklahoma (Arraignment transcript 21-22).

The following Monday (June 11, 1973), Judge Bohanon entered a written order in which he stated (Pet. App. C.):

> Upon reconsideration, the Court is of the opinion that its oral Order of June 8, 1973, should be vacated * * * and that the defendants should be granted until June 18, 1973, in which to file a written Motion as to venue, together with brief;

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[1]None of petitioner's co-defendants had moved for a change of venue, nor did any of them at that time join in the motion for change of venue.

[2]In waiving the requirement for filing a brief, Judge Bohanon stated:

> The Court is familiar with all of the newspaper stories. The Court is familiar with all of the complications in this case, and I am convinced that the Defendant cannot get a fair and impartial trial in this District. [Arraignment transcript 21.]

> the plaintiff is allowed until June 25, in which to file written response and brief. The Court will thereafter set the matter for hearing and disposition * * *.

On June 13, 1973, petitioner, without objecting to Judge Bohanon's order of June 11, filed a written motion for change of venue in compliance with said order. Subsequently, two other co-defendants also filed motions for change of venue (docket sheet).

On July 2, Judge Brown of the United States District Court for Kansas was assigned to the Western District of Oklahoma. Judge Bohanon then transferred the two cases here involved to him (Petitioner's Exhibits 5 and 6 in record on appeal).

On July 19, 1973, Judge Brown set all pending motions for hearing on July 26, 1973. On July 24, petitioner asked the Court of Appeals for the Tenth Circuit to rule that the oral order of June 8, 1973, had divested the Western District of Oklahoma of jurisdiction and cast venue in the Eastern District. The court of appeals dismissed petitioner's claim as "wholly without merit" (Pet. App. A1).[3] Moreover, "[i]n the alternative," the court of appeals held that if, in fact, the district court had lost jurisdiction to vacate its order, it was exercising its supervisory powers to reassign and transfer the case back to the Western Distirct of Oklahoma. The court of appeals further held (Pet. App. A2):

> The denial of relief herein is without prejudice to the right of the trial court to whom the cases

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[3]A hearing on the merits was held on October 24, 1973. At that time Judge Brown denied the motion for a change of venue, with leave to renew after *voir dire*.

> are assigned to consider the motions for a change of venue or any further motions for change of venue which may be filed together with any and all motions filed on behalf of the Defendants consistent with the dispositions of the motions for change of venue.

Petitioner contends that the trial court, having orally granted a change of venue motion, cannot vacate that order the next court day. Petitioner is, in effect, asking this Court to hold that a trial judge, having decided that a ruling he made was incorrect, cannot vacate that ruling even though there has been no detrimental reliance thereon—that, in the context of this case, once the oral order was made, venue was immediately and irrevocably taken from the Western District of Oklahoma and deposited with the Eastern District. There is no merit to this claim.

Judge Bohanon's original ruling was clearly incorrect for several reasons. First, it would have deprived petitioner's co-defendants of their constitutional right to a trial in the "district wherein the crime [was] committed" (Amendment VI, U.S. Constitution). By ordering a transfer as to the non-moving defendants, it also would have violated Rule 21(a) of the Federal Rules of Criminal Procedure, which states that "[t]he court upon motion of the defendant shall transfer the proceeding *as to him* to another district * * *" (emphasis added). Finally, the ruling was clearly contrary to local Rule 13(e), which specifies that a motion pursuant to Fed. R. Crim. P. 21 shall be in writing and supported by a brief.[4]

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[4]Rule 13(e) of the Rules of the United States District Court for the Western District of Oklahoma provides:

> (e) *Motions in Criminal Cases.* Motions in criminal cases, and particularly motions made pursuant to Rule 7(f), 12, 16,

Having realized his error, Judge Bohanon certainly had the right to correct it, acting as he did before he had even entered a formal order and before any party had time to rely detrimentally thereon and before the case was actually transferred to the Eastern District of Oklahoma. As Judge Learned Hand stated in an analogous situation: "The order [to transfer the action to another district as the more convenient forum] did not affect automatically to transfer the cause; the transmittal of the papers was to be the symbolic act of transfer; and the case was still in the district court * * *" *Magnetic Engineering and Mfg. Co.* v. *Dings Mfg. Co.*, 178 F. 2d 866, 868 (C.A. 2). See also *In re Southwestern Mobile Homes, Inc.*, 317 F. 2d 65 (C.A. 5); *Fischer* v. *United Airlines, Inc.*, 218 F. Supp. 223 (S.D.N.Y.)[5]

21 and 41(e), Federal Rules of Criminal Procedure, shall be in writing and state with particularity the grounds therefor and the relief or order sought. All such motions shall be filed with the Clerk within ten days after arraignment, and a copy served upon the United States Attorney unless a different time is fixed by statute or the Federal Rules of Criminal Procedure. All motions must be accompanied by a concise brief citing all authorities upon which the movant relies. The Court may, however, in its discretion, allow such motions to be made at a time later than that fixed by this Rule.

[5]There is no merit to petitioner's claim (Pet. 7) that there is a conflict among the courts of appeals. The case upon which petitioner relies, *United States* v. *Marcello*, 280 F. Supp. 510 (E.D.La.), affirmed, 423 F. 2d 993 (C.A. 5), certiorari denied, 398 U.S. 959, is inapposite. That case does not hold, as petitioner intimates, that a district court cannot vacate an order transferring venue once a finding of prejudice is made. On the contrary, the district court held that a request by the defendant to vacate an order granting a change of venue (which he had requested) is a matter within the court's discretion. In affirming, the Court of Appeals for the Fifth Circuit reiterated that the trial court "clearly has the power to vacate at Defendant's request an order granting a change of venue. Whether or not he should do so is left to his sound discretion" (423 F. 2d at 1005).

Although authority on this rather obscure point is slight, it is clear that a court generally has the authority to correct an erroneous ruling before any party has been prejudiced thereby. Cf. *Bozza* v. *United States,* 330 U.S. 160. Here, petitioner has not been prejudiced in any way by the judge's action in vacating his order on the next working day following its issuance.

Moreover, even if the district court lacked the power to vacate its original order, here the court of appeals expressly ordered in the alternative (to its denial of the application for a writ of mandamus) that the case be reassigned and transferred to the Western District of Oklahoma, albeit without prejudice to consideration of petitioner's motion for a change of venue in the orderly manner prescribed by the applicable procedural rules. Such action was clearly within the supervisory powers of the court of appeals (*United States* v. *Dooling,* 406 F. 2d 192 (C.A. 2), certiorari denied *sub nom. Persico* v. *United States,* 395 U.S. 911), and petitioner does not argue to the contrary. His argument is that it was improper for the court of appeals to do so here in the face of the so-called "finding" of the district court that petitioner could not get a fair trial in the Western District of Oklahoma. This claim ignores the facts (1) that there is nothing in the record to support such a "finding" and (2) that neither the district court (in vacating the original order) nor the court of appeals purported to rule on the merits of petitioner's claim. The holding of both courts was simply that the motion be presented and decided in an orderly manner.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1974.